

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

76-1576

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Index No. 76-1576

v.

JAMES F. HEIMERLE and RICHARD WARME,

Appellants.

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BRIEF SUBMITTED BY JAMES F. HEIMERLE IN PRO PER

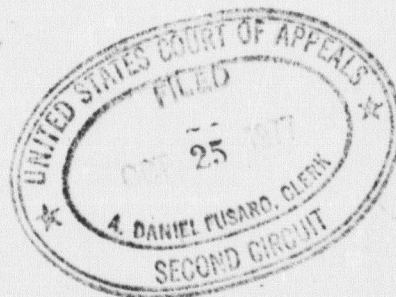


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee

-against-

JAMES HEIMERLE,
Defendant-Appellant

BRIEF FOR THE DEFENDANT
JAMES HEIMERLE

PRELIMINARY STATEMENT

This is an appeal by James Heimerle in accordance with the provisions of 18 U.S.C. 3576. Following a jury trial before the Honorable Milton Pollack in the United States District Court for the Southern District of New York, Heimerle was found guilty on the first count of Indictment no. 76 Cr. 0442 which charged a violation of 18 U.S.C. 473. This crime carries a maximum penalty of 5 (five) years imprisonment. On November 15, 1976 a hearing pursuant to 18 U.S.C. 3575 was held by Judge Pollack and at the conclusion of this hearing

Heimerle was adjudicated a "Special Dangerous Offender" and was sentenced to a term of 10 (ten) years imprisonment under the provisions for enhanced sentencing authorized by that statute. Notice of Appeal from the judgement of conviction was filed on November 15, 1976. That appeal has not yet been perfected. This is a separate and distinct appeal from the enhanced sentence under 18 U.S.C. 3575 as provided for in 18 U.S.C. 3576.

Heimerle is currently incarcerated pending this appeal.

QUESTIONS PRESENTED

1. Was the Government's Notice defective in that it failed to set forth any facts to support a finding of "dangerous" under 18 U.S.C. 3575 (f)?
2. Does the failure of the trial court to provide notice of hearing pursuant to 18 U.S.C. 3575(b) require remand for resentencing?
3. Did the trial court abuse its discretion in finding that Heimerle was a "dangerous special offender"?
4. Is the term "dangerous" as used in 18 U.S.C. 3575 unconstitutionally vague?
5. Is the finding of 'Special Offender' a denial of due process and equal protection; when, any Assistant U.S. Attorney can arbitrarily - capriciously and/or vindictively, sua sponte, decide who is a special offender?

STATEMENT OF FACTS

On February 6, 1976 James Heimerle was arrested by agents of the United States Secret Service. He has been incarcerated since that date. On February 11, 1976 Heimerle was indicted in the Southern District of New York (76 Cr 0146 - hereinafter : "Heimerle I") and charged with various violations of 18 U.S.C. 473 and 371. The substance of these charges arose from activities which it was alleged that Heimerle engaged in between January 27, 1976 and February 6, 1976. On February 23, 1976 bail was fixed in the amount of \$50,000:

On February 20, 1976 the Government served notice pursuant to 18 U.S.C. 3575 (a) that in the event that Heimerle was convicted an enhanced sentence would be sought in accordance with this statute (see Appendix, docket sheet for 76 Cr 0146). On April 29, 1976 a new indictment (76 Cr 0442 - hereinafter: "Heimerle II") was handed down in the Southern District, which charged 4 (four) additional violations of 18 U.S.C. 473 and 371. In this indictment the alleged criminal activities covered the period from November 1, 1975 to February 29, 1976 (thus overlapping the time period covered by Heimerle I, concluding at a time when Heimerle had already been incarcerated for 23 (twenty-three) days). It is clear from the record (see Appendix - Minutes of 6/15/76 (Heimerle I)) that the indictments in Heimerle I and Heimerle II were the results of a single investigation (c.f.

minutes of 6/15, p. 4, l. 12 et seq.).

On May 5, 1976, following a jury trial before Judge Metzner, Heimerle was convicted on all four counts in the Heimerle I indictment. On May 11, 1976 bail in Heimerle II was set at \$25,000.

On June 14, 1976, Heimerle's retained counsel submitted a memorandum in opposition to the Government's previously filed Notice pursuant to #3575 (a). The following day Heimerle appeared before Judge Metzner for a determination on the #3575 application as well as for sentencing. Judge Metzner declined even to hold a hearing, since the Government alleged nothing more than Heimerle's past criminal record, declaring:

What more do you tell me than his prior convictions which I am aware of? (Minutes of 6/15, 4, l.8)

.....

I have read your information, I read the probation report and I have come to the conclusion after reading both that I would not impose a sentence greater than the maximum sentence provided by law.

(idem., p. 6, l. 2, et seq.)

Heimerle was then sentenced to a term of 7 (seven) years imprisonment to be followed by 5 (five) years probation. Bail was continued on appeal (idem., p.19, l. 21).

Bail was continued on appeal (idem., p. 19, line 21). The Government did not oppose continuance of bail, despite the fact that an application had been made pursuant to 18 U.S.C. 3575, nor did Judge Metzner raise the possibility of revoking bail pursuant to 18 U.S.C. 3148.

Heimerle filed Notice of Appeal on June 15, 1976 and the Government filed a cross-appeal (76-1375) under #3576. To date the Government's cross-appeal has not been perfected and a motion to dismiss this cross-appeal, submitted by Heimerle, pro se, is currently pending before this Court.***

The Heimerle I 3575 "Hearing"

As indicated above, before Judge Metzner proceeded with sentencing he addressed himself to the Government's 3575 application. The 3575 application listed 4 (four) prior convictions for Heimerle:

<u>COURT</u>	<u>CRIME</u>	<u>SENTENCE</u>
N.Y. State Sup. Ct. Queens Cty. (12/22/72)	Larceny in the 3rd degree	4 years (on appeal, N.Y.S. Court of Appeals)
N.Y. State Sup. Ct. N.Y. Cty. (12/21/72)	Forgery in the 2nd degree	4 years (concurrent with the above)
U.S. Dist. Court. S.D.N.Y. (6/18/73)	18 U.S.C. 371	1 year (consec. to 1 & 2 above) * + +
U.S. Dist. Court S.D.N.Y. (6/18/73)	18 U.S.C. 1341	4 years (probation) *

In addition, the language of 3575 (e-2) was incorporated within the Government's moving papers, although no factual support was adduced (c.f. minutes, 6/15/76, p. 4, l. 2). The Court also had the benefit of a probation report.

Judge Metzner concluded that as a matter of law the mere recital of Heimerle's past convictions was insufficient to sustain a "Special Dangerous Offender" adjudication and determined that a hearing was unnecessary. Further, Judge Metzner ruled that as a matter of law no information contained within the probation report could conceivably justify a "Special Dangerous Offender" adjudication (minutes of 6/15/76, p. 3, ll. 17 et seq.). It is important to emphasize here that Judge Metzner had before him Heimerle's full record of convictions as well as the report of the Probation Department which contained an adverse comment made by an employee of a Federal half-way house regarding Heimerle. ^{***} The significance of the fact that Judge Metzner had this report before him will be seen in the analysis of the 3575 hearing in Heimerle II (infra.)

* Judgement of conviction vacated and indictment dismissed pursuant to order of Judge Brieant (76 Civ. 5563), 12/15/76. / Reinstated July 25, 1977 - Appeal pending

** This employee's opinion was presumably based on observations of Heimerle who resided in a federal half-way house for slightly over two months in 1975.

*** Vacated & Dismissed 6/22/77

**** ^{GOVERNMENT'S} MOTION TO WITHDRAW GRANTED AFTER SENTENCE ON 76-442 ~~XXXXXXXXXXXXXXXXXXXX~~

The Heimerle II Trial

In reference to Cr 0442 the Government filed notice of readiness for trial as early as July 12, 1976 (c.f. Appendix - docket sheet for Cr 0442). The case was assigned to the Honorable Milton Pollack and a firm trial date, September 13, 1976, was set. Prior to this firm trial date the Government did NOT file a 3575 notice. However, shortly before trial was to commence the Government suddenly moved for an adjournment. A new trial date for September 17 was set and once again the Government requested another adjournment. On September 21, 1976, four days AFTER trial was originally scheduled to commence, the Government filed a Notice pursuant to 18 U.S.C. 3575 (a) (copy of Notice in Appendix). Trial was commenced before Judge Pollack on September 27, 1976 and on October 1, 1976 the jury found Heimerle guilty on one count (18 U.S.C. 371) of the four count indictment. Sentencing was set for November 15, 1976. On November 11 the Government's #3575 Notice was delivered to Judge Pollack and ordered unsealed (c.f. Docket sheet, Cr 0442). Thus, Judge Pollack received this Notice only four days prior to sentencing and did not have the opportunity to comply with #3575 (b) requiring that 10 DAYS notice of hearing be given by the court to a defendant relative to the holding of a #3575 hearing.

The Heimerle II 3575 Hearing .

Despite the fact that insufficient notice pursuant to #3575 (b) was given, Judge Pollack proceeded to hold the #3575 hearing on the morning of sentence, November, 15, 1976. The Government's Notice, submitted on September 22, 1976 consisted of a recital of Heimerle's past convictions and a one paragraph addendum in which the language of #3575 (e-2) was recapitulated. No factual data was offered to support the #3575 (e-2) allegations and indeed, upon commencement of the hearing the Assistant U.S. Attorney stated categorically:

The government will note for the record that it will proceed today only under the charges of 18 USC 3575(e-1). The notice charged that the government would offer evidence as to 3575 (e-2) as well. The statute does not oblige the government to charge more than one section... (emphasis added)
(Minutes of Hearing, p. ~~10~~, l. 12 et seq.)
703

The Government reiterated its intentions in this regard shortly thereafter:

With respect to today's proceeding, the government will proceed only with respect to (e-1), the recidivist defendant. (Minutes, p. ~~11~~, l. 18 et seq.)
709

The Governme nt then offered into evidence the four prior convictions as to Heimerle which had previously been submitted to Judge Metzner in the Heimerle I hearing as well as the record of conviction in Heimerle I. In addition, the government drew the Court's attention to the observations of the half-way house employee which were contained in the probation report (Minutes, p. ~~16~~⁷¹⁵). *

* The same probation report was utilized in the Heimerle I and II hearings.
(Minutes, pp. ~~28-29~~)
15-16

5.
716

The government then rested as to the evidentiary proceeding (Minutes, p. 10).

Heimerle's counsel offered no evidence but argued that:

1. The comments of the half-way house employee should be disregarded as hearsay (Minutes, p. 20).
718
2. The Government's notice failed to charge Heimerle with violating 3575(f).
(Minutes, p. 21)
719
3. No competent evidence was adduced by the government indicating that Heimerle was a threat to the community. (Minutes, p. 21)
719
4. 18 U.S.C. 3575 is unconstitutional "because of the deficiencies cited in our brief" (copy of brief in Appendix).

In rebuttal the Government relied heavily on the opinion of the Court in U.S. v. Stewart, 531 F. 2d 326, as to the constitutionality of the statute.

After further argument by both counsel the court set forth its opinion and findings. Summarised, the conclusions of the court were as follows:

1. Heimerle is a recidivist (Minutes, p. 33)
731
2. There is no need for a psychiatric evaluation to Heimerle's mental state to determine that he is dangerous (Minutes, p. 33, 34).
731-732
3. "The notice which preceded this hearing duly specified and the Court finds that the defendant is a dangerous special offender within the definition of Sections 3575(e) and (f).*" (Minutes, p. 34).
732
4. Heimerle poses a danger to other persons in the community because, " he probably is suffering from a severe personality disorder" (Minutes, p. 36).
736
5. Heimerle is dangerous because he is a recidivist (Minutes, p. 39).
737
6. The term "dangerous" as used and defined in #3575 is not unconstitutionally vague.

Judge Pollack then sentenced Heimerle to a term of 10 (ten) years imprisonment, this sentence to run consecutive to the sentence previously imposed by Judge Metzher in Heimerle I.

Heimerle filed Notice of Appeal from this judgement of conviction on November 15, 1976. This appeal from the #3575 determination and sentence is brought pursuant to 18 U.S.C. 3576.

It is respectfully submitted that the Government's 3575 Notice was fatally defective in that it failed to specify any facts in support of a 3575(f) finding nor, in fact, did it even invoke Section (f). It is further submitted that the court erred procedurally in failing to accord the statutorily required 10 (ten) days notice of hearing; that the court abused its discretion in finding that Heimerle was a "Special Dangerous Offender" and that the term "dangerous" as used in #3575 is unconstitutionally vague.

* It may be recalled that the government's notice made NO specifications as to #3575(f)

POINT I

THE GOVERNMENT'S NOTICE WAS FATALLY DEFECTIVE IN THAT IT FAILED TO SET FORTH ANY SPECIFICATIONS TO SUPPORT A FINDING OF "DANGEROUSNESS" UNDER #3575(f)

In U.S. v. Stewart (supra. at 332), the case so heavily relied upon by both the government and the court in the instant matter (c.f. p. 5, above), the Court declared:

The statute (#3575) requires notice to the defendant of the Government's intention to seek an "increased sentence"...that notice must also set out "with particularity" why the Government believes the defendant is a "dangerous special offender".

The Stewart court, of course, incorporated the very language of #3575 (a), itself. Nowhere in the Government's notice in the case at bar is there a single specification as to alleged "dangerousness". In Heimerle I (supra.) Judge Metzner dismissed the Government's application that Heimerle be sentenced pursuant to #3575 because of this omission (c.f. Appendix, Minutes of 6/15/76, p. 3).

It is apparent from the face of the record (Appendix - Minutes of ^{677 J. 11/15/76} 11/15/76) that the Government mistakenly believed that specifications as to 3575(e-1) would satisfy the requirements for specifications as to 3575 (f). (Minutes of 11/15/76, p. 10).

That this position is manifestly incorrect can be seen by even a cursory examination of the statute. Sections (e-1 through e-3) provide only the first step in a final adjudication under this statute. A defendant must first be shown to be a recidivist (e-1) or a professional criminal (e-2) or (e-3) in order to be adjudicated a "Special Offender".* Upon such proof, he must then be shown to be a DANGEROUS "Special Offender" (f). #3575 does not permit enhanced sentencing for recidivists per se (Stewart, supra. at 333), but for DANGEROUS recidivists, and thus there must be a specification and factual showing in the Government's notice pertaining to "dangerousness" (c.f. Stewart, supra, at 332). In both Stewart (supra.) and U.S. v. Duardi, 529 F. 2d 123 (8th Cir.) it was held that inadequacy to provide factual support for representations of "dangerousness" in the Government's notice was a fatal defect as to the proceedings.

It is instructive to examine the allegations of dangerousness which were upheld by the Stewart court and to compare them with the circumstances in the instant matter. In Stewart the Government was prepared with some 25 witnesses and was prepared to show that:

1. Subsequent to the conviction in question Stewart had participated in five additional felony type acts, including robbery, escape and gun violations.
2. That law enforcement personnel considered Stewart violent and as one who would not hesitate to kill.

* By ANY ASSISTANT U.S. ATTORNEY WITHOUT "Due Process" Hearing c.f. Healy 552 F.2d 1184

In the case at bar no specifications were given in the Government's notice other than Heimerle's past criminal record, which showed no propensity towards violence whatever .

Reference should be made to the circumstances in U.S. v. Holt (397 F. Supp. 1397, aff'd in part sub nom. U.S. v. Bailey, 537 F. 2d 845, 5th Cir.) , where the Government's notice alleged that Holt was at the time serving a 99 year sentence for armed robbery; that he was a drug addict and that he was the "brains" behind a vicious assault on a fellow prisoner (see ~~Appendix for~~ full Holt opinion). Mere restatement of the crime(s) for which a defendant has been convicted does not satisfy the requirements of the statute or the intention of Congress in enacting this statute (S. Rep. No. 91-617, 91st Cong., 1st. See., 1969, p.163). The specific legislative intent of #3575 was to serve the purpose:

...of keeping dangerous offenders, who are likely to repeat violent crimes from committing such crimes.
(Stewart, supra., at 334)

The Government's Notice in the instant matter failed to show that Heimerle was violent, or indeed, that he was dangerous. Indeed, at the hearing, the Government categorically declared that it would adduce NO evidence as to Heimerle being "dangerous" (Minutes of 11/15/76, p. ⁷⁰³~~10~~). In view of the statutory mandate that the Government set forth "with particularity" the reasons why it believes a defendant to be dangerous and in view of the Government's failure to do so as regards Heimerle, it is respectfully submitted that the Government's notice is defective on its face.

POINT IIFAILURE OF THE TRIAL COURT TO PROVIDE NOTICE OF HEARING PURSUANT TO 3575 (b)
REQUIRES REMAND FOR RESSENTENCE

It should be recalled that in the case at bar Judge Pollack unsealed the #3575 notice on November 11, 1975, the date that this notice was transmitted to him. The #3575 hearing and sentencing took place on November 15, 1976. 18 U.S.C. 3575 (b) requires that:

Upon any plea of guilty or nolo contendere or verdict or finding of guilt of the defendant...a hearing shall be held before sentence is imposed by the court sitting without a jury. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant at least ten days prior thereto (emphasis added).

In enacting this statute Congress recognized that inherent prejudice would exist where proper notification under #3575 (b) was absent (H.R. No. 91-1549 on S. 30 in U.S.C. Cong. & Admin. News, 91st Cong., 2nd Sess., 1970, p. 4007 et seq.)

Sentences under #3575 must be overturned where strict compliance with statutory prerequisites is absent (U.S. v. Bailey, supra.) The language of the statute is quite clear as to the time requirements for notice by the Court in #3575 proceedings and as Judge Gee held in his concurring opinion in Bailey (supra.):

We are bound to enforce the statute (#3575) as Congress wrote it (Bailey, supra., at 850).

while the Bailey majority held that although the "potential for prejudice is miniscule" in respect to the technical defect, the sentence still had to be overturned.

In U.S. v. Tramunti, 377 F. Supp. 6 (S.D.N.Y., 1974), the court held that a violation by the government of the technical procedures outlined in #3575 requires that the notice be stricken.

In U.S. v. Noland, 495 F. 2d 529 (5th Cir., 1974), the court dealt with an analagous situation where a technical defect existed in a notice pursuant to 21 U.S.C. 851 (Special Drug Offenders Act). The Noland court held that:

Provision for enhanced sentencing is a legislative decision, and the procedure the legislature prescribes to effectuate its purpose must be followed.
(Noland, supra., at 533)

It is submitted that the statute makes no provision for waiver of the 10 day notice and that the failure to provide such notice requires, at the very least, remand for resentence.

POINT IIITHE TRIAL COURT ABUSED ITS DISCRETION IN HOLDING THAT HEIMERLE WAS A SPECIAL DANGEROUS OFFENDER

In Heimerle I, Judge Metzner held that on the basis of Heimerle's record of convictions and in considering the probation report there were insufficient grounds for even holding a #3575 hearing (c.f., p. 3 above). In Heimerle II, Judge Pollack held that Heimerle was indeed a Special Dangerous Offender and utilized as a factual basis for this finding the identical information previously rejected by Judge Metzner with the sole exception that the conviction at the trial at which Judge Metzner presided was now to be considered. It must be emphasized that the only new information before Judge Pollack was the conviction in Heimerle I, a conviction arising from the same investigation and covering the same activities and time period that resulted in the conviction in Heimerle I (c.f. p. 4 above). Neither the Congress nor the courts (c.f. Stewart, supra.) anticipated that #3575 as a recidivist statute, per se. Rather, the statute is aimed at violent recidivists (Stewart, supra at 334) or professional criminals (#3575 (e-2) and (e-3)).

In the case at bar the government categorically withdrew any and all specifications as to Heimerle being a professional criminal (c.f. minutes of 11/15/76) nor did the court in its opinion determine that he was such (c.f. minutes of 11/15/76, ⁷³¹ p. 32 et seq.). Nor was it at anytime alleged that Heimerle was violent.

Even if enhancement can be justified by the nature of the offense (Stewart, supra. at 333), Judge Metzner had already determined that the offense of counterfeiting, as regards Heimerle, did not, in fact, justify such enhancement. Since Judge Pollack was confronted with the almost identical crime, committed during the same time period, arising from the same investigation, Judge Metzner's ruling should have been left undisturbed.

An analysis of past applications of #3575 in Duardi, Holt and Stewart show that the courts have construed "dangerousness" in terms of previous violent behaviour and/or a propensity towards violence. These elements are lacking in the case at bar.

Nor did Heimerle, as Stewart did, commit additional crimes. Rather, he was convicted while incarcerated, in two trials, involving non-violent charges stemming from a single investigation.

No evidence was adduced at the hearing as to #3575(f). The court, however, gratuitously held that Heimerle would pose a danger to the community (Minutes of 11/15, p. ⁷³⁶38), without any supporting evidence being presented by the Government. Such a gratuitous finding is not in accord with the statutory mandate that such a finding must set forth reasons "with particularity". One might contrast Judge

* Also, Grand Jury Minutes, J. PETER, MARCH 4, 1976 SESSION, Page 10 L. 13

Pollack's amorphous conception of "dangerousness" with that enunciated by Mr. Justice Black in Sellers v. U.S. (89 S. Ct. 36) that a "dangerous" defendant is one who so jeopardizes the public that the only way to protect against it would be to keep the defendant in jail. And at least as to a #3148 determination, Justice Black inferred that "dangerous" would have to be considered within the contextual framework of a crime of violence.

The analogy to #3148 is not farfetched. The Stewart court utilised the analogy in upholding the constitutionality of the term "dangerous" in #3575. In application 3148 has been restricted to situations in which there is an imminent danger of flight or where there is a persistent danger to a community of crime on a major scale or of violence, neither of which was in evidence in the case at bar.

Were there not factors in the case at bar that Judge Pollack did NOT consider?

1. The Government failed to perfect its 3576 appeal from Judge Metzner's refusal to sentence Heimerle under #3575.
2. The Government even failed to request revoking appeal bond in Heimerle I pursuant to 3148.
3. The Government failed to file a #3575 notice in Heimerle II before the first scheduled trial date, September 13, 1976. **

The Stewart court held that:

The District Court judge must administer a sentence which is not disproportionate in severity to the maximum term provided for the crime. ***
(Stewart, supra., at 331)

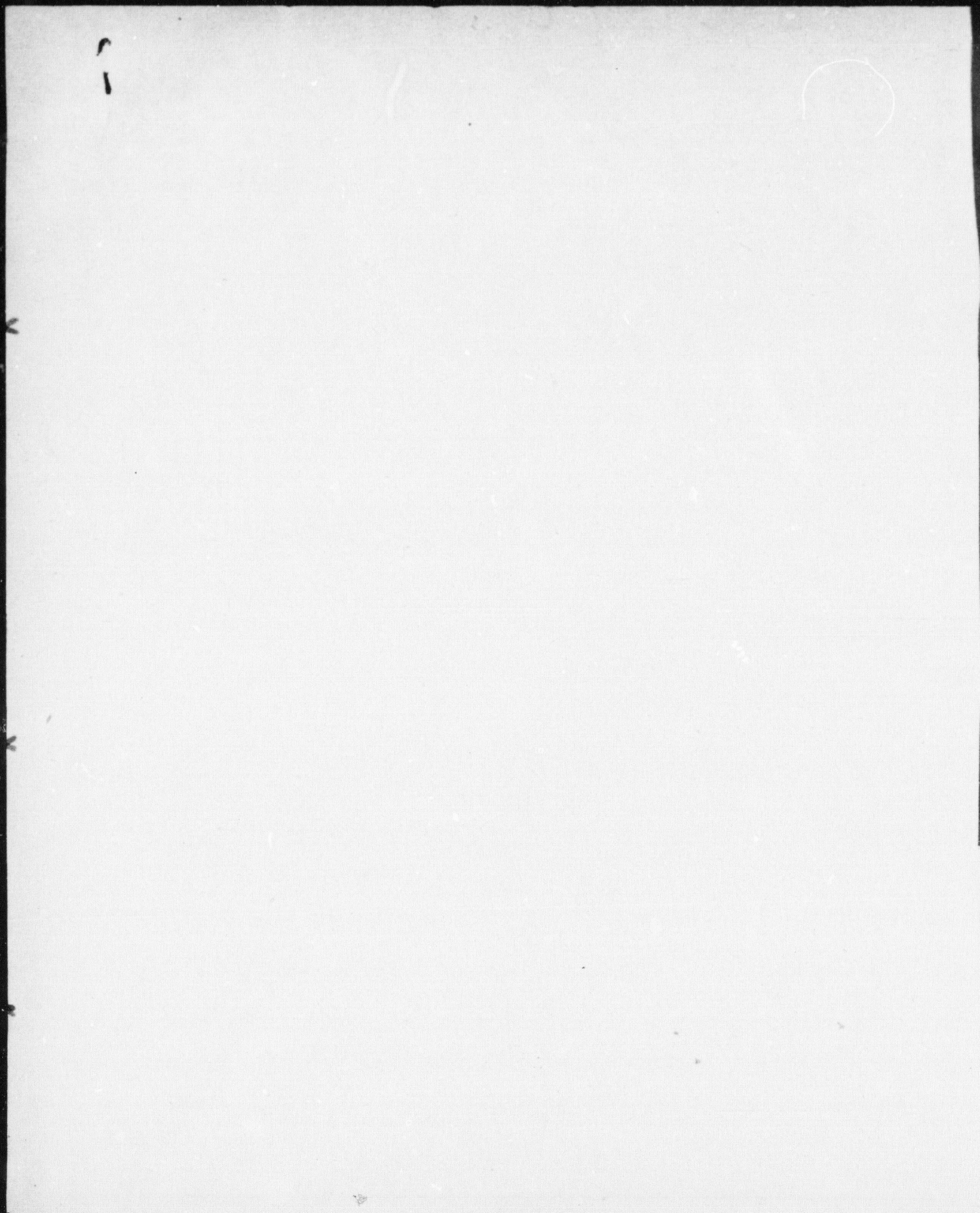
In the case at bar the maximum sentence which Heimerle could have received had he not been sentenced under #3575 was 5 years (c.f. Minutes of 11/15/76, p. ⁷³⁶~~37~~). Under the provisions for enhancement invoked by Judge Pollack, Heimerle was sentenced a term of imprisonment exactly double that to which he would otherwise have been sentenced. It is for this court to consider whether a "double sentence" is disproportionate within the meaning of the statute.

* For an example of non-violent crimes for which 3148 has been invoked see U.S. v. Nelson, 346 F. Supp. 926, aff'd 467 F. 2d 944, cert. den. 410 U.S. 956 - Major Drug Trafficking

*** And The government's 3575/76-1375 appeal was not being diligently prosecuted, contrary, it was still pending, but more importantly, the appeal in HEIMERLE I was still pending after sentence in HEIMERLE II

*** U.S. v. Henry, 552 F.2d 1184, (11/19/77) ONE DAY in addition to median sentence for offense therein.

Finally, we must consider the finding of the trial court that Heimerle "is suffering from a severe personality disorder". This finding must be considered unique in the annals of forensic medicine since there is no record in connection with any of Heimerle's past convictions or in any other context, of an evaluation by a psychiatrist. However, assuming arguendo that the court had some basis, unknown to Heimerle or his counsel, or to the Probation Department for that matter, for arriving at such a conclusion, then a psychiatric study should have been ordered in accordance with Pate v. Robinson. The court, in its wisdom, however, arrived at an ex parte determination that a psychiatric evaluation of Heimerle's mental state was unnecessary (Minutes of 11/15/76, pp. 731-732, 33-34).



POINT IV

THE TERM "DANGEROUS" AS USED IN 18 U.S.C. 3575 IS UNCONSTITUTIONALLY VAGUE
It is certainly no secret that thus far the circuits are split as regards
the constitutionality of the term "dangerous" as used in 3575. In U.S.
v. Duardi, (384 F. Supp. 874, W.D. Mo.) the court held:

It would be constitutionally impermissible for this
court sitting without a jury to make a finding of
dangerousness without a jury to make a finding of
dangerousness under #3575(f).

Although the 8th Circuit affirmed the Duardi decision it declined to rule
on the issue of constitutionality (U.S. v. Duardi 529 F. 2d 123). The District
Court in Duardi (supra.) relied heavily on the requirements of due process enun-
ciated by the Supreme Court in Specht v. Patterson, 386 U.S. 605 where the
invocation of the Colorado Sex Offenders Act constituted a new and distinct
criminal charge.

The Stewart court (supra.) rejected the invocation of Specht on the grounds that
increased sentence procedure is not a separate criminal charge and indeed the
legislative history of #3575 would seem to confirm the view of the Stewart court
as regards Specht (c.f. S. Rep. No. 91-617, 91st. Cong., 1st. Sess., 1969, p.
163). It is not, then, on Specht grounds that the issue of unconstitutionality
is herein raised, but on the usage in the statute of the term "dangerous",

that issue to which the 8th Circuit refused to address itself in Duardi (supra.)

The Stewart court begged the issue in declaring:

...Title X does not make it a criminal offense to be "dangerous"....rather this statute is directed against criminals convicted - not of being "dangerous" - but of having violated a law of the United States.

(Stewart, supra. at 336)

It is submitted that the Stewart court either did not say what it meant, or worse, did not mean what it said. The entire legislative history of #3575 vitiate against its being considered as a statute designed to make it a "criminal offense" to violate the laws of the United States (apart from tautological and rhetorical complications concomittant with such an interpretation). First, on the face of the statute, its thrust is aimed at recidivists (e-1) who are "dangerous"(f) or professional criminals (e-2) and (e-3) who also may be adjudicated "dangerous" (f). The language of the statute is not particularly instructive as to a definition of dangerousness:

A defendant is dangerous for purpose of this section if a period of confinement longer than that provided for such a felony is required for the protection of the public from further criminal conduct by the defendant (18 U.S.C. 3575 (f))

Even the Stewart court admitted that Section (f) required construing in the context of its legislative history (Stewart, supra. at 337) .

The legislative history of this statute makes it apparent that the law was designed to deal primarily with organized crime and that the term "dangerous" as used in Section (f) is a shorthand form of the phrase "organized criminal" (c.f. Department of Justice's comments in U.S.C. Cong. & Admin. News, 1970, p. 4067). This "shorthand" was undoubtedly designed to circumvent the less euphemistic (or more realistic) terminology held unconstitutional by the Supreme Court in Lanzetta v. New Jersey (306 U.S. 451). The District Court in Duardi (supra. at 869) forsook euphemism and equated the terminology of Section (f) in terms of its intent with that terminology held impermissible by the Lanzetta court:

The notion that the government can proceed upon the theory that "organized crime" offenders pose a special threat to the public...is totally without support.

If the term "dangerous" is vague it is then also unconstitutional in accordance with Connally v. General Construction Co. (269 U.S. 385). If, instead, "dangerous" is a synonym for "organized crime" then it is unconstitutional in accordance with Lanzetta (supra.)

In holding that "dangerous" is not vague the Stewart court declared that vagueness was avoided because Congress undertook to prescribe standards for determining that a defendant is "dangerous" (Stewart, supra. at 337). But this, also is not the

case. Congress most certainly DID prescribe standards for determining that a defendant was a "Special Offender" (e-1, e-2, e-3), but no standards whatever were provided for an actual determination of "dangerousness" other than the tautological assertions of Section (f). For stripped of "legalese", Section (f) might be translated somewhat as follows: "A dangerous person is one who should be in jail for a long time."

The statute provides no standards, no procedures and no guidelines for determining whether a defendant requires an enhanced sentence for the protection of society. For if the guidelines set forth in Section (e) were determinative, then Section (F) would be unnecessary. **

The case at bar can serve as an adequate example. Heimerle was found to be a recidivist (e-1). This did not suffice to make him "dangerous". To support such a finding the Court relied on the alleged observations of a half-way house employee, allegedly submitted to the Probation Department and presumably incorporated within the recommendations of the Probation Department to the court (Minutes of 11/15/76, p. ⁷³33 et seq.). The implications of granting such powers to the court are frightening and so we arrive full circle at Specht and the due process rationale contained therein. If a pragmatic interpretation of statute necessitates interpretation in terms of praxis then it is submitted

** *THE HOLMES COURT 511 F.2d 1073; THE PERKINS COURT 426 F.2d 1033; ALIGNED WITH THE HENRY G.*
* *ALTHOUGH, IN SO DOING, DUE PROCESS AND EQUAL PROTECTION WERE TOTALLY DISCARDED*

that this court should reject the language of #3575 as regards dangerousness, if only because of the facts before it in the case at bar.

CONCLUSION

For the above stated reasons the sentence of the court pursuant to 18 U.S.C. 3575 should be vacated and the appellant should be remanded for resentence without regard to 18 U.S.C. 3575.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Index No. 76-1576

v.

JAMES F. HEIMERLE and RICHARD WARME,

Appellants.

APPENDIX

UNITED STATES DISTRICT COURT - CRIMINAL DOCKET

Felony ☒ JUDGE / Assigned Trial
 Minor Offense ☐ MICHAEL WHITE 0835
 Misdemeanor ☐ 0208 1 Disposition

U.S. vs. HEIMERLE, JAMES F.

Case Filed
 Day Mo. 11 2
 No. of 02
 Defendants
 Yr. 76 Docket No. 0146

CHARGES

U.S. CODE SECTION

18:473

18:371

OFFENSES

Deal. in counterfeit oblig. or sec.

Consp. so to do.

COUNTS

1-3

4

MAGN. CASE NO. 76-164

☐ BAIL & RELEASE
☐ Personal Rec.
☐ Denied ☐ Unsecured B.
☐ AMT ☐ Conditional Release
☐ Set (1000) ☐ 10% Du
☐ \$ 50 ☐ 3rd Party
☐ Collateral
☐ Bail Not Made
☐ Bail Status Changed
☐ PSA
 (See Docket)

U.S. Attorney or Asst.

Alan Naftalis, Sp. Atty. Michael Pollack

(212) 791-1156

Defense: CJA, Ret., Waived, Self, None, Other, PD, CD
 1345 Ave. of Americas, NYC 10019
 247-3720

ARREST

2-6-76
 U.S. Custody
 Began on Above
 Charges

☐ High Risk
 Dorn. &
 Date Design'd

INDICTMENT

Information ☐
 2-11-76

Waived ☐
 Superseding
☐ Indict/Info

ARRAIGNMENT

2-23-76

1st Plea
 2-23-76
 Final Plea

Trial Set For
 5-3-76

☒ Not Guilty
☐ Nolo
☐ Guilty
☐ Not Guilty
☐ Nolo
☐ Guilty

TRIAL

Voir Dire ☐
 Trial Began ☒
 5-3-76
 Trial Ended
 5-5-76

SENTENCE

Disposition 6-15-
☒ Convicted ☒ On All C
☐ Acquitted ☐ On Le...
☐ Dismissed ☐ Offense
☐ Volled/Discontinued

		DATE	INITIAL/No.	INITIAL APPEARANCE	INITIAL No.	OUTCOME
SEARCH WARRANT	Issued			2/6/76	SS 080E	<input type="checkbox"/> Dismissed <input type="checkbox"/> Held for District GJ <input type="checkbox"/> Held to Answer to U.S. District Court AT: Magistrate's Initials
	Return					
	Issued					
	Served					
SUMMONS						<input type="checkbox"/> Exonerate <input type="checkbox"/> To Transfer District
Arrest Warrant						
COMPLAINT	2-6-76	SS 080E				
OFFENSE (In Complaint)	18 USC 472, 371 utter and sell a forged federal note					

Show last names and suffix numbers of other defendants on same indictment/information

V. Excludable Data

ROSENBERG-2

DATE

PROCEEDINGS

(a) (b) (c)

2-11-76 Filed indictment. Indictment returned before me at 5:40 PM.

Motley, J.

2-23-76 Deft. (Atty. present) pleads not guilty. (Jail). Magistrate fixed bail at \$50,000 continued. Case assigned to Metzner, J. for all purposes..Tenney, J.

02-26-76 Filed defts affdt. and notice of motion to reduce bail, which is presently fixed at \$50,000, ret.on: dateto be fixed by court.

02-27-76 Filed memo end. on defts. motion dated 2/26/76 for reduction of bail---Motion is denied. So ordered, Metzner, J. m/n

02-26-76 Filed defts. notice of appearance by: Michael Pollack of 1345 Ave. of Americas, NYC.

03-08-76 Filed the following papers recd. from the office of Mag. Schreiber: docket sheet; ~~complaint~~ complaint; disposition ~~xx~~ shettl

4-6-76 Filed govts. notice of readiness for trial.

OPPOSITE THE APPLICABLE DOCKET ENTRIES IN SECTION IV SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC §3161(h) - "SPEEDY TRIAL ACT".

P

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY				LETTER C For Identifi- cation of Exclud- able Delay U.S.C. 3161
		(a)	(b)	(c)	(d)	
-76	Filed govts. requests to charge.					A. Exhaust hearing in mental or physical capacity U.S.C. 42
5-3-76	Jury impaneled and sworn. Trial begun. Metzner, J.					B. NARA action (21 U.S.C. 20)
5-4-76	Jury trial contd.					C. State or F trial on o charge.
5-5-76	Jury trial contd. and concluded. Deft. found guilty on each of cts. 1, 2, 3 & 4. PSI ordered. Sentence adj. to June 4, 1976. Bail contd. Metzner, J.					D. Interlocut Appeal.
5-13-76	Filed order--ORDERED that the aforesaid sealed notice be delivered by the Clerk to the Hon. Chaires Metzner, J. Tenney, Jm. (5/13/76-- one envelope was delivered to the law clerk of Judge Metzner, Thomas Jones which was filed and sealed on 2/20/76).					E. Hearings pretrial m.
16-76	Filed one sealed envelope ordered sealed and impounded and placed in vault in cashier's office. So ordered, Metzner, J.					F. Transfers other dist. (per F.R. Rules 20, & 40).
6-16-76	Filed defts. supplement to his motions previously submitted by his attys.					G. Defendant under ad. order to 30 U.S.C. is exclud- able 3161(n)(1)
6-15-76	Filed JUDGMENT (atty. Michael Pollack, present)-- the deft. is hereby committed to the custody of the Atty. General or his authorized representative for imprisonment for a period of SEVEN (7) YEARS on each of cts. 1 and two to run concurrently with each other, Five (5) years on ct. 4 to run concurrently with the sentence imposed on each of cts. 1 & 2. The imposition of sentence is suspended on ct. 3 and the deft. is placed on probation for a period of five (5) years to commence upon completion of sentence imposed on each of cts. 1, 2, & 4 and subject to the standing probation order of this court Metzner, J. (copies issued 6-17-76)					H. Miscellane- ous Proceed- ings Parole rev- ision, Dup- lication, Prosecution by indictment, or otherwise of essentials of defenses.
7-76	Filed defts. notice of appeal to the USCA from the final judgment entered on June 15, 1976. (copies mailed to AJSA and to deft. at 150 Park Row, MCC, NYC)					I. Period of trial or phy- incomplete of defense stand via
8-76	Filed govts. notice of appeal to the USCA from the judgment of conviction and imposition of sentence after proceedings under Section 3575 of Title 18, USC before Judge Metzner, on June 15, 1976. (copies mailed to defts. atty. Michael Pollack of 1345 Ave. of Americas, NYC 10019)					J. Period of trial or phy- incomplete of defense stand via
8-76	Filed defts. memorandum of law.					K. Period of trial or phy- incomplete of defense stand via
8-76	Filed transcript dtd. 6/28/76.					L. Period of trial or phy- incomplete of defense stand via
-76	Filed original notice that the original record on appeal has been certified and transmitted to the USCA this date.					M. Period of trial or phy- incomplete of defense stand via
19-76	Filed Transcript of record of proceedings, dated 5-5-76					N. Period of trial or phy- incomplete of defense stand via
12-76	Filed notice that the record on appeal has been certified & transmitted to the USCA					O. Period of trial or phy- incomplete of defense stand via
14-76	Filed Temp. Commitment of deft. by Mag. Schreiber dated 2/6/76					P. Period of trial or phy- incomplete of defense stand via
4-76	Filed Commitment - deft. deliv. to MCC on 6/15/76					Q. Period of trial or phy- incomplete of defense stand via
31-76	Filed Transcript of record of proceedings, dated 5-5-76					R. Period of trial or phy- incomplete of defense stand via

A. Exhaust
hearing in
mental or
physical
capacity
U.S.C. 42

B. NARA
action (21
U.S.C. 20)

C. State or F
trial on o
charge.

D. Interlocut
Appeal.

E. Hearings
pretrial m.

F. Transfers
other dist.
(per F.R.
Rules 20,
& 40).

G. Defendant
under ad.
order
to 30 U.S.C.
is exclud-
able
3161(n)(1)

H. Miscellane-
ous Proceed-
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I. Period of
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S. Period of
trial or phy-
incomplete
of defense
stand via

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY				U.S. District Court Southern District of New York U.S.C. 3161
		(a)	(b)	(c)	(d)	
7-76	Filed govts. requests to charge.					A. Examination hearing for mental or physical capacity U.S.C. 424
7-76	Jury impaneled and sworn. Trial begun. Metzner, J.					B. NARA Ex- amination (28 U.S.C. 299)
7-76	Jury trial contd.					C. State of trial on ou charges
7-76	Jury trial contd. and concluded. Deft. found guilty on each of cts. 1, 2, 3 & 4. FSI ordered. Sentence adj. to June 4, 1976. Bail contd. Metzner, J.					D. Interlocutory Appeals
7-76	Filed order--ORDERED that the aforesaid sealed notice be delivered by the Clerk to the Hon. Charles Metzner, J. Tenney, Jr. (5/13/76-- one envelope was delivered to the law clerk of Judge Metzner, Thomas Jones which was filed and sealed on 2/20/76).					E. Hearing on pretrial mo vements
16-76	Filed one sealed envelope ordered sealed and impounded and placed in vault in cashier's office. So ordered, Metzner, J.					F. Transfer to other district for P.R.C. Hins 2/2/2 & 401
5-76	Filed defts. supplement to his motions previously submitted by his attys.					G. Defendant under advis op to 30 d is excluded
5-76	Filed JUDGMENT (atty. Michael Pollack, present)-- the deft. is hereby committed to the custody of the Atty. General or his authorized representative for imprisonment for a period of SEVEN (7) YEARS on each of cts. 1 and two to run concurrently with each other, Five (5) years on ct. 4 to run concurrently with the sentence imposed on each of cts. 1 & 2. The imposition of sentence is suspended on ct. 3 and the deft. is placed on probation for a period of five (5) years to commence upon completion of sentence imposed on each of cts. 1, 2, & 4 and subject to the standing probation order of this court. Metzner, J. (copies issued 6-17-76)					H. Miscellaneous proceedings Parole rev tion. Expe tion.
7-76	Filed defts. notice of appeal to the USCA from the final judgment entered on June 15, 1976. (copies mailed to AUSA and to deft. at 150 Park Row, NYC, NY)					I. Prose cutto by indicial se ment.
8-76	Filed govts. notice of appeal to the USCA from the judgment of conviction and imposition of sentence after proceedings under Section 3575 of Title 18, USC before Judge Metzner, on June 15, 1976. (copies mailed to defts. atty. Michael Pollack of 1345 Ave. of Americas, NYC 10019)					J. Period for trial or phys inconfe of defense stand trial
8-76	Filed defts. memorandum of law.					K. Period of NARA Co mitment to Treatment
8-76	Filed <i>transcript dtd. 6/28/76</i>					L. Supersede indict pro and/or charges
7-76	Filed original notice that the original record on appeal has been certified and transmitted to the USCA this date.					M. Defendant awaiting tr of Co-def dant when severance been granted
						N. Continuance Granted 3161 (a) (i.e. and justice or pleas of outweigh defendant's interests).
						O. Time betw guilty ple and writ drawal.
						P. Time whil moving fr from state tutions pe transfer detained cedure
						Q. Grand Jur dictment tendency 3161 (a)
						R. Any delay cluded by order for not in this above.
		(a)	(b)	(c)	(d)	
	Interval (per Section II)	Start Date End Date	Ltr. Code	Total Days		

CRIMINAL DOCKET - U.S. District Court

PETTY OFFENSE PO ☐ JUDGE/MAGISTRATE Assigned U.S.
 OTHER MINOR OFFENSE MO ☐ 0208 1 0848
 OTHER MISDEMEANOR Mis ☐ Disp / Sentence
 FELONY Fel ☒ District Office

vs HEIMERLE, JAMES F.

(LAST, FIRST, MIDDLE)

Case Filed 04-29-76 0442

No. of Def's * 04

JUVENILE

U.S. MAG CASE NO

U.S. TITLE/SECTION
 18:371
 18:473

OFFENSES CHARGED
 Consp. to deal in counterfeit.
 Dealing in counterfeit.

ORIGINAL COUNTS
 1
 2-4

SUPERSEDING COUNTS

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL
U.S. Custody Began 2-29-76	High Risk Date Information <input type="checkbox"/>	5-11-76	Trial Set For 9-27-76
Summons Served	Indict. Waived	5-11-76	Trial Set For 9-27-76
First Appearance	In Charging District 4-29-76	Final Plea	Trial Ended 10-1-76

Disposition
 10-1-76
☒ Convicted
☐ Dismissed

MAGISTRATE

DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	INITIAL/NO.	OUTCOME
Search Warrant Issued		PRELIMINARY EXAMINATION OR REMOVAL HEARING		HELD FOR GJ OR OTHER
Summons Issued		Waived / Not Waived		HELD FOR GJ OR OTHER
Summons Served		Intervening Indictment		HELD FOR GJ OR OTHER
Arrest Warrant Issued				
COMPLAINT				
OFFENSE (In Complaint)				

U.S. Attorney or Asst

ATTORNEYS

Defense [] CJA [] Trial [] Waive [] Set [] Name / Other []

Alan R. Naftalis
791-1156

* Show last name and index numbers of other defendants on same indictment information

Warne-2, Horowitz-3., Peters-4.

DATE

(INDICTMENT NO.)

PROCEEDINGS

EXCLUDED

4-29-76

Filed indictment.

Superseding indictment 76 Cr 243 and referred to Judge Pollack.

✓ 05-11-76

Deft. (atty. Michael Pollack present) Pleads not guilty. Bail of \$50,000. fixed in 76 Cr. 146 by Judge Metzner to cover this indictment. Deft. remanded in lieu of bail totalling \$75,000. Pollack, J.

✓ 05-14-76

Pre-trial before Pollack, J.

2 5-1

✓ 07-1-76

Pre-trial before Pollack, J.

2 7-1

07-12-76

Filed Govt's notice of readiness for trial.

08-04-76

Filed Afdt. for w/h/c, ad-pros. directed to the Warden of Atlanta Federal Penitentiary. Ret. 08-16-76.

09-22-76

Filed one envelope ordered sealed and impounded and placed in vault in room 66G. Palimieri, J.

- 09-27-76

Deft. (atty. Michael Pollack) jury trial begun. Pollack, J.

- 09-28-76

Trial cont'd.

- 09-29-76

Trial cont'd.

9/13/76
23

DATE	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY				For Identifying Periods of Ex- cludable Delay Per U.S.C. 3161(h)
			Interval Between (a)	Start Date End Date (b)	Ltr. Code (c)	Total Days (d)	
9-30-76	Trial cont'd.						A. Examination hearing & re- port of physical ex- aminer (U.S.C. 3161(h)) B. NARA Exam- ination (28 U.S.C. 2201) C. State or Fed- eral Prison or other inst. D. Interlocutory Appeal E. Hearing before the F. Transferring of the (18 U.S.C. 3771 & 401) G. Informal hearing to determine whether the defendant is a "juvenile" (18 U.S.C. 3771 & 401) H. Transfer of the defendant to a Federal Prison (18 U.S.C. 3771 & 401) I. Transfer of the defendant to a Federal Prison (18 U.S.C. 3771 & 401) J. Transfer of the defendant to a Federal Prison (18 U.S.C. 3771 & 401)
10-1-76	Trial cont'd. & concluded. Partial verdict.						
	Deft. found guilty on ct. 1. Jury disagreement as to cts. 2,3, & 4. Mistrial declared as to cts. 2,3 & 4. Jury discharged. Pre-sentence report ordered. For sent. 11-15-76 at 10AM. room 518. Deft. cont'd. remanded. Pollack, J.						
10-11-76	Filed deft's motion re: set aside verdict.						
10-15-76	Filed memo-end. on motion docketed this date. the motion is denied. Pollack, J. m/n						
11-1-76	Filed Order that the notice sealed on 9-21-76 be forwarded to Judge Pollack to be unsealed, etc. Palmieri, J. m/n						
11-11-76	Filed Order to Show Cause re: contempt of court of Michael Pollack with regard to 3500 material. ret: 11-22-76 room 518 at 10AM. Pollack, J.						
11-11-76	Filed Govt's affdvt. re: support of show cause order						
11-15-76	Filed Govt's noticere: Dangerous Special Offender.						
11-15-76	Filed Govt's memo. of law re: support of notice.						
11-15-76	Filed deft's memo. of law re: Special Offender, etc.						
11-16-76	Filed transcript of record of proceedings, dated Sept. 17, 1976						
11-15-76	Filed Judgment (atty. Michael Pollack) # 77,025 Ct. 1 pursuant to 18:371 and as a Dangerous Special Offender pursuant to 18:3575 for a term of 10 yrs. Sent. to run consecutive to the sent. of impr. imposed by Metzner, J. on 6-15-76 on 76 Cr. 146 and consecutive to any confinement that may be imposed hereafter for viol. of prob. imposed by Briant, J. on 72 Cr. 1331 -AND- FINED						

\$10,000. committed fine. Cts. 2,3 and 4 dismissed on deft's motion. Pollack, J. issued all copies issued all copies

11-22-76

Filed deft's notice of appeal from judgment of 11-15-76. Mailed to deft. & U.S. Atty.

- N Period of ...
- G ...
- P ...
- R ...
- I ...
- U ...
- V ...

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER



Address Reply to the
Division Indicated
and Refer to Initials and Number

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Organized Crime and Racketeering Section
One St. Andrews Plaza, New York, N.Y. 10007

September 22, 1976

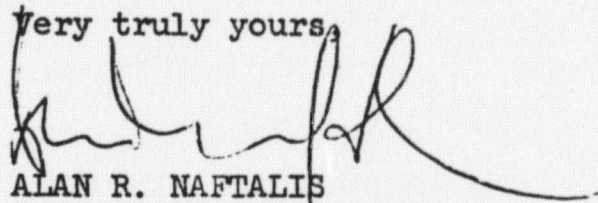
Michael B. Pollack, Esq.
1345 Ave. of the Americas
New York, N. Y. 10019

Re: James Heimerle

Dear Mr. Pollack:

Per our conversations I am forwarding herewith copy of the Dangerous Special Offender notice filed by the Government against the above-captioned individual on indictment 76 Cr. 442. This notice was signed and sealed before Honorable Edmund Palmieri.

Very truly yours,


ALAN R. NAFTALIS
Special Attorney
U. S. Department of Justice

ARN:feh

Enclosure

9/22 } NOTICE

9/27 }
28 }
29 } TRIAL
30 }
10/1 }

11/15 } HEARING
SENTENCE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA :

-v- :

76 Cr. 442

JAMES F. HEIMERLE, :

Defendant. :

-----X

NOTICE TO THE COURT THAT THE ABOVE-
NAMED DEFENDANT IS A DANGEROUS
SPECIAL OFFENDER

Now comes the United States, by and through its attorney, Alan R. Naftalis, Special Attorney, United States Department of Justice, who is charged with the prosecution of the above-named defendant before the United States District Court for the Southern District of New York for alleged violations of Title 18, United States Code, Sections 371, 473, which are felonies committed when the defendant was over the age of 21 years, and hereby files this notice with the Court,

in compliance with the provisions of Title 18, United States Code, Section 3575(a), stating that upon conviction to said felonies this defendant is subject to the imposition of sentence under Title 18, United States Code, Section 3575(b) as a dangerous special offender.

I do believe that said defendant is a dangerous special offender for the reasons that this defendant has previously been convicted in the Courts of the United States and the State of New York for two or more offenses committed on occasions different from one another and from such felony and punishable in such Courts by imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the Commission of such felony, and less than five years have elapsed between the Commission of such felony and the defendant's release on parole or otherwise, from imprisonment for one such conviction and his Commission of the last such previous offense or another offense punish-

able by imprisonment in excess of one year under applicable laws of the United States and the State of New York, all within the meaning of Title 18, United States Code, Section 3575(e)(1). Furthermore, the felonies charged in the instant indictment constituted a part of a pattern of conduct which was criminal under applicable laws of this jurisdiction, which constituted a substantial part of the defendant's income, and in which the defendant has manifested special skill or expertise, all within the meaning of Section 3575(e)(2) of Title 18, United States Code.

The United States will offer evidence which will prove that:

The defendant JAMES HEIMERLE pled guilty to the crime of forgery in the Second Degree under New York State Supreme Court Indictment No. 3694-72 and on November 21, 1972 he was sentenced to a maximum term of four years imprisonment.

The defendant JAMES HEIMERLE pled guilty to the crime of grand larceny in third degree in Supreme Court, Queens County New York, on November 28, 1972.

On June 18, 1973 the defendant was convicted by a jury sitting in the Southern District of New York for violation of Title 18, United States Code, Section 371 for conspiring with others to violate Title 18, United States Code, Sections 472 and 473; he was similarly convicted violating Title 18, United States Code, Section 472 for unlawfully, wilfully and knowingly and intent to defraud did pass, utter, publish and sell and attempt to pass, utter, publish and sell falsely made forged and counterfeited \$50 and \$100 Federal Reserve Notes. The maximum sentence of imprisonment under Title 18, United States Code, Section 371 for five years imprisonment and the maximum sentence under Title 18, United States Code, Section 472 for 15 years imprisonment. The defendant was sentenced to one year imprisonment under this indictment, indictment No.

72 Cr. 1330 (RLC).

On July 23, 1974 the defendant JAMES HEIMERLE pled guilty to violation under Title 18, United States Code, Section 1341, for using the mails in executing the scheme and artifice to defraud. Section 1331 of Title 18 bears a maximum period of imprisonment of five years. Judge Charles L. Brieant, Jr. *Production* sentenced the defendant to four years of imprisonment Southern District of New York indictment number 72 Cr. 1331.

On May 5, 1976 the defendant JAMES HEIMERLE was convicted by a jury sitting in the Southern District of New York in a four count indictment charging him with violation of Title 18, United States Code, Section 371, for his participation in a conspiracy to sell counterfeit \$100 Federal Reserve Notes; and three violations of Title 18, United States Code, Section 473 for his participation in three sales of counterfeit \$100 Federal Reserve Notes. The sales referred to in this indictment took place in January and February of 1976. The defendant faced a maximum of five years imprisonment for his *same time period as the*

conviction of violating Section 371 and a maximum of 10 years imprisonment for each of his three convictions for violating Title 18, United States Code, Section 473. The Honorable Charles M. Metzner sentenced the defendant on June 15, 1976 to seven years imprisonment under this indictment, Southern District of New York indictment number 76 Cr. 143.

Furthermore, the United States will offer evidence to indicate that the present offense is part of a pattern of conduct which is criminal under the applicable laws of this jurisdiction, to wit the illegality of transferring, selling, exchanging and delivering counterfeit obligations of the United States, that the income derived therefrom constituted a substantial part of the defendant's income and that this defendant has manifested special skill or expertise in the distribution of counterfeit obligations of the United States. In the later regard, evidence will be offered to show the

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defendant's knowledge of the location of an illicit printing plant for the production of counterfeit obligations.

OVER →

Ken Wilber

ALAN R. NAFTALIS
Special Attorney
U.S. Department of Justice

Date _____

Date _____

EDMUND L. PALMERI
United States District Judge

UNITED STATES GRAND JURY

SOUTHERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

-v-

JOHN DOE

----- X

UNITED STATES COURT HOUSE
FOLEY SQUARE
NEW YORK, NEW YORK

MARCH 4, 1976
4:10 p.m.

APPEARANCES:

ALAN R. NAFTALIS, ESQ.,
SPECIAL ATTORNEY, U.S.
DEPARTMENT OF JUSTICE

STEWART NISSENBAUM
Acting Grand Jury Reporter

NATIONAL REPORTING INC.
certified shorthand reporters
FIVE WORLD TRADE CENTER
NEW YORK, N.Y. 10048
(212) 466-1280

interest and to pose the questions the Grand Jurors wish to pose to you, and I'm not here as your attorney. While I will advise you as to general legal principles, when and if those problems do come up, specific questions concerning your answers or your continued responses before this Grand Jury are to be determined solely by you and your attorney of your own choosing, not between you and myself. Do you understand that?

A Yes, I do.

Q With an understanding of those circumstances, Mr. Peters, it's my understanding that you still wish to continue with your examination.

A Yes, I do.

Q Mr. Peters, do you know a man named James Heimerle?

A Yes, I know him well.

Q How did you first come to know him?

A I met him in prison. I worked in the reception center there and he had the same job that I did, you know. That's how I know him.

- Q Which prison is this?

A Greenhaven, Stormville, New York.

Q Mr. Peters, did there come a time after your release from prison that you came to see Mr. Heimerle again?

A No.

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A That's right.

Q That's how number you contacted him at?

A That's the only way I could get in touch with Jimmy and he could get in touch with me at home.

Q That was his family's home?

A His mother's home. At that time he was living in a halfway house. He had just gotten out of Greenhaven. He went to Connecticut and the Federal people put him in a halfway house.

Q Now, you were interviewed by a special agent of the Secret Service, were you not, and shown a photograph, on the 23rd of January, 1976?

A I want to get this into the record here. I sent for the Secret Service, and I asked to see them, and I told them about the counterfeiting. I want that entered into the record.

Q You identified a photograph of Mr. Heimerle as the man you had been dealing with?

A Yes.

Q You identified him in the photograph, to the Secret Service?

A Yes, I did.

Q In the course of your conversations with the Secret Service, did you indicate to them that Mr. Heimerle had

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sold half a million dollars worth of counterfeit--

MR. NAFTALIS: Strike that amount.

Q Did you further tell the Secret Service that you had knowledge that Heimerle had sold a substantial quantity of counterfeit 100 dollar notes to Richard Warner?

A Yes.

Q And this was a Richard Warner of Irvington, New York, correct?

A That's right.

Q Mr. Peters, I show you this picture. Can you identify the man in that photograph?

A Yes, that's Richie Warner.

MR. NAFTALIS: I would like this marked as Grand Jury exhibit No. 1, Mr. Reporter. (So marked)

A I pronounce the name Warner. I always took it as Richard Werner.

Q You knew him as Richard Werner?

A Yes.

Q And the man you know as Richard Werner is the man who you identified in that photograph, Grand Jury Exhibit 1.

A All right.

Q You just testified that Mr. Heimerle sold a substantial number of these hundred dollar notes to the man you knew as Richard Werner, correct?

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

A

UNITED STATES OF AMERICA,

:

v.

76 Cr. 146

JAMES F. HEIMERLE,

:

Defendant.

June 15, 1976
5:00 P.M.

B E F O R E :

HON. CHARLES M. METZNER,

District Judge.

A P P E A R A N C E S :

ROBERT B. FISKE, JR., ESQ.,
United States Attorney for the
Southern District of New York
ALAN NAFTALIS, ESQ.,
Assistant United States Attorney

MICHAEL B. POLLACK, ESQ.,
Attorney for the Defendant

2 (In open court)

3 THE CLERK: United States of America v.
4 James F. Heimerle.

5 Is the government ready?

6 MR. NAFTALIS: Ready to proceed with the
7 hearing.

8 MR. POLLACK: Defendant is ready, your Honor.

9 THE COURT: I have come to the conclusion
10 that there is no need for a hearing on this case. I have
11 read the information filed by the government pursuant to
12 Section 3575(a) of Title 18 of the United States Code and
13 I have read the pre-sentence report.

14 Having read both of those I have come to the
15 conclusion that I would not impose a sentence greater than
16 the maximum sentence provided by law for the crimes of
17 which the defendant has been found guilty. So, consequently,
18 there is no need for a hearing.

19 MR. NAFTALIS: Your Honor, can the government
20 inquire on what basis the Court made that determination?

21 THE COURT: I have read your petition.

22 MR. NAFTALIS: Your Honor, I yesterday read
23 the pre-sentence report and as I note from the pre-sentence
24 report, the pre-sentence report, from both the comments of
25 what they described as the Unit Manager of the Halfway

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2 House that this defendant was assigned to, described him
3 basically as an incorrigible, a person prone to violate
4 the law and one who has not shown an attempt to change
5 his life style.

6 Further, the conclusions of the Probation
7 Department were such that they resounded that in their
8 final statement to the Court in the Probation Department,
9 that this is a person who will be a habitual offender.
10 And the special dangerous offender statute is aimed at
11 the professional criminal, at the habitual offender.

12 The government requests the right --

13 THE COURT: You could have proceeded as a
14 recidivist under 3575(e).

15 MR. NAFTALIS: But we have several options
16 open to us.

17 THE COURT: I only have what you filed and I
18 am passing upon what you filed and I have read what you
19 filed and I read the allegations in what you filed and
20 I have read the pre-sentence report and I have come to the
21 conclusion that I would not impose a sentence greater than
22 the maximum provided by law.

23 MR. NAFTALIS: Wouldn't the government be
24 permitted to offer evidence to show the skill of this
25 defendant, to show that the defendant qualifies under the

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2 provisions cited?

3 THE COURT: You were supposed to set forth
4 that all in here and I have read it.

5 MR. NAFTALIS: We are supposed to set forth,
6 and the statute requires, and I can't cite the statute
7 specifically, and if the Court will bear with me --

8 THE COURT: What more do you tell me than
9 his prior convictions which I am aware of? What more are
10 you telling me than what he was convicted of before me,
11 the case over which I presided?

12 MR. NAFTALIS: We will show activity con-
13 ducted by this defendant at the same time that he was on
14 parole. Not just with respect to this criminal activity
15 but on the criminal activity that investigations conducted
16 by the Secret Service and the Grand Jury of the Southern
17 District of New York, that at the time he was violating
18 the parole in this indictment was --

19 THE COURT: Go indict him and convict him.

20 MR. NAFTALIS: There is another investigation
21 pending.

22 THE COURT: When he is found guilty of that
23 indictment, then that Judge can be the person before whom
24 you bring this petition.

25 On the record as it stands before me now I

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will not assume guilt on the indictment that is pending.
I will not assume guilt based on investigations which you
say you have conducted when he has not been indicted for
them.

MR. NAFTALIS: Your Honor, the government
humbly requests the opportunity to submit a brief of
law to the Court.

THE COURT: No, you have had plenty of time
to do that.

MR. NAFTALIS: If I may note with respect to
that I received the defendant Heimerle's brief last night
at 5:00 o'clock in the evening. Defendant Heimerle was
given a postponement from June 4th until June 15th with
respect to his hearing in this matter at his counsel's
request. His counsel had ample opportunity prior to this
time to file the brief and did not file it with the govern-
ment until the night before the hearing.

I have attempted to prepare an answer. The
answer is in draft form. I think the government should
be given the same opportunity to file a brief with the
Court.

THE COURT: Obviously it is not the defendant's
brief that has motivated my conclusion, is it? You heard
what I said.

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I read your information, I read the probation report and I have come to the conclusion after reading both that I would not impose a sentence greater than the maximum sentence provided by law.

That being so, there is no need to have a hearing.

MR. NAFTALIS: The government takes exception.

THE COURT: If you have other information regarding this man, go indict him. And if you have an indictment, go convict him. When you have accomplished that, then you can proceed before the Judge before whom the man may be convicted under this notice.

But as the case stands today, June 15th, having read your petition, having read the pre-sentence report, I will not impose a sentence greater than the maximum sentence provided by law.

MR. NAFTALIS: Your Honor, the government marks for the records its exception.

THE COURT: I am prepared to impose sentence now or do you want to wait until tomorrow morning?

MR. NAFTALIS: The government has no objection on the imposition of sentence now, your Honor.

THE COURT: Mr. Pollack?

MR. POLLACK: Your Honor, I have read the

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probation report. My client has not. I would like a chance for him to read it and go over it with him. It is a short report and will take about five minutes.

THE COURT: All right. I, of course, do not furnish anyone with the recommendations of the Probation Department because I make the determination. I give you the factual material in the report.

MR. POLLACK: In the report that I read yesterday, your Honor, that is exactly what I saw.

(Pause)

THE COURT: That will conclude the hearing. This has to be docketed now as a public document and filed.

MR. NAFTALIS: The government would request that that notice be sealed.

THE COURT: It cannot be sealed. It is opened now. It has to be opened.

MR. NAFTALIS: The government intends to go forward and file a similar notice against this defendant in the outstanding indictment before Judge Pollack.

THE COURT: Doesn't the statute provide that it becomes open once you moved?

MR. NAFTALIS: I request it only, your Honor, in that the existence of this notice in the one case against this defendant concerning counterfeit in no way

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2 possible can be known to a Judge that would be the
3 presiding Judge in another indictment outstanding against
4 this defendant in which the government intends to file
5 a similar notice.

6 THE COURT: What is the point?

7 MR. NAFTALIS: The point is the statute
8 speaks in terms of the Judge who presides over the trial
9 of the defendant is not to know of the existence of the
10 notice of dangerous --

11 THE COURT: In this case, me.

12 MR. NAFTALIS: Correct, your Honor.

13 THE COURT: If you want to file a new one
14 you do not show it to the Judge in the next case.

15 MR. NAFTALIS: But the government in this
16 instance is trying to prevent any possibility of an
17 allegation later being made of the knowledge of this,
18 implying that knowledge of a --

19 THE COURT: What are you talking about?

20 MR. NAFTALIS: If for some reason this
21 file was mistakenly brought to Judge Pollack's chambers
22 and he saw the existence of the special dangerous offender
23 notice in this case, it is a fair assumption he may
24 construe the government had another counterfeiting case
25 against the same defendant in which the amounts of

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2 counterfeit involved were in excess of what he was charged
3 in here.

4 The government once again may have filed a
5 notice to proceed with special dangerous offender treat-
6 ment. It may be argued that he was aware of the existence
7 of that notice, which is opposite to the requirements
8 of the statute, 3575.

9 So the government is asking for this to be
10 resealed to prevent any possibility of the argument
11 later being raised of possible prejudice or possible
12 advance knowledge on the part of Judge Pollack.

13 THE COURT: I will grant the application on
14 the basis of the sentence appearing in 3575(a), which
15 reads,

16 "If the Court finds that the filing of the
17 notice as a public record may prejudice fair consideration
18 of a pending criminal matter," and you tell me there
19 is a pending criminal matter?

20 MR. NAFTALIS: Yes. It is Indictment 76
21 Cr. 442.

22 THE COURT: "The Court may order the notice
23 sealed."

24 MR. NAFTALIS: Thank you, your Honor.
25 Have that sealed and I will sign it.

(Pause)

MR. POLLACK: Your Honor, several questions I would like to address.

There is mention in here of prior convictions in the probation report. Are we to assume that the only probation report that the Court is considering is the five-page one you have handed me?

THE COURT: That is all I received.

MR. POLLACK: As to the content of the report, may I address myself to that?

THE COURT: Yes.

MR. POLLACK: There are two things in there which causes my client and myself concern, when I read it yesterday and he today; that is, one, the opinion of the Unit Manager as to his prognosis, the basis of his opinion and the basis of the contact between the individuals.

Do I not think that should have any effect on this Court in sentencing? We do not know who the Unit Manager is, we don't know the basis of the ability of his to pass judgment. I think it should not be considered by this Court.

THE COURT: I will not consider it.

MR. POLLACK: The other thing is the suspicion rendered by the State Parole Officer that my client did

not reside at the residence which he had given the Parole Officer. Each time they had visited the premises my client was there and all his personal belongings were in those premises. I think that that suspicion is unfounded.

THE COURT: That has no effect on the sentence I am going to impose.

MR. POLLACK: Two other things, your Honor. I would like to at this time review each motion we had made at the end of the case for a new trial -- directed verdict under Rule 29 and a new trial.

THE COURT: Let's dispose of that first. Those motions are denied.

MR. POLLACK: Your Honor, we have requested by letter permission to interview the jurors.

THE COURT: I have denied it.

MR. POLLACK: I would like to renew my request and state that my client is adamant when he says when he was in the hallway --

THE COURT: He could not have been. The jury was disposed and everybody agreed, including you, that our jury was out twenty minutes before he went outside.

MR. POLLACK: I don't know how long the jury was out.

THE COURT: That motion is denied.

MR. POLLACK: Will the Court not allow us to just talk to the jurors?

THE COURT: Of course not. The jury outside was Judge Stewart's jury. That has been established by a special investigation.

Next point.

MR. POLLACK: Has there been a special investigation regarding that?

THE COURT: Regarding the escape of the prisoner.

MR. POLLACK: Has there been a report on it?

THE COURT: No.

MR. POLLACK: I did not know that.

THE COURT: It was agreed in the robing room by you and counsel for the government that the jury was excused twenty minutes before. Everybody left this courtroom, including the defendant. And I was present of my own personal knowledge. I deny the application. I deny the renewal of the application.

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Next point.

MR. POLLACK: On the --

THE COURT: I was sitting here and observed it. Go ahead.

MR. POLLACK: Respectfully except, your Honor.

On the issue of sentencing then, your Honor,
may I just address myself to the probation report?

I wish to point out to the Court that my
client has requested permission to leave this jurisdiction.
He requested the join his wife in Colorado and that
request was denied.

The motivation by the State Probation officers,
when he made it, and that request had been made in an
effort to free himself from whatever past associations he
had, it was an effort to move out and join his wife and
establish a familial relationship in a different setting
in which he would have a chance to build a life free of
past associations.

That request was made in good faith prior to
any indication of governmental interest in his activities.
I think this Court should understand that that request was
indicative of this defendant's desire and motivation,
which is contrary to what appears in this report. I think
that had that request been granted the problem my client
has would have been greatly changed and alleviated.

I think at this time a period of long
incarceration is not as beneficial to my client as a
change from this community. I would request and ask the

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2 Court in considering the sentence to be passed upon Mr.
3 Heimerle, that it consider allowing him to go to Colorado,
4 allowing him to rejoin his wife which would, in effect,
5 take him out of the melieu which has caused the problem
6 which existed here.

7 If he went to Colorado he wouldn't have met
8 Mr. Mitchell, he wouldn't have gotten back with the
9 gentleman himself who is under indictment, and as this
10 Court is well aware that indictment is still pending.
11 The problems here would not exist.

12 I submit to the Court that incarceration can
13 only serve to institute and cause him to lose a wife
14 that he is separated from by distance, and when he is
15 released causes him to return to the same community with
16 the same problems and the same persons, the same temptations
17 from which he sought to escape prior to the proceedings
18 which this Court is now here to adjudge.

19 In that vein, your Honor, I believe that is
20 a viable and a positive alternative to a period of
21 incarceration which I submit to the Court would not be
22 fruitful in the long run to society's interest.

23 THE COURT: Are you finished?

24 Do you have anything to say, Mr. Heimerle?

25 THE DEFENDANT: No, sir.

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2 THE COURT: Do you have anything to say,
3 Mr. Naftalis?

4 MR. NAFTALIS: Yes, your Honor. Just one
5 short comment.

6 The government submits that the defendant
7 Heimerle stands before you as a professional habitual
8 criminal, a recidivist. Moreover, the government stands
9 by the conclusions of the Department of Probation in its
10 assessment of this defendant which noted in the conclusion
11 of his probation report, "His recent confinement sentence
12 is followed by a probation sentence appeared to have little
13 effect to deter Heimerle from further illegal activity
14 for financial gain."

15 The United States stands by this and submits
16 to the Court that this defendant, if given the opportunity
17 again, would once again, regardless of geographic
18 location, return to active involvement in criminal activity
19 for financial gain.

20 THE COURT: Let me have the probation
21 report, please. .

22 MR. POLLACK: Yes, your Honor.

23 (Handing)

24 THE COURT: Mr. Heimerle, is it true that
25 you were serving a sentence pursuant to a state conviction?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: And how long was that sentence?

3 THE DEFENDANT: Indeterminate - four years.

4 THE COURT: What was the charge?

5 THE DEFENDANT: Possession of a stolen
6 airline ticket.

7 THE COURT: Is it true you were found guilty
8 before Judge Carter of uttering and dealing in counterfeit
9 notes and conspiracy to do so on June 18, 1973?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: And did Judge Carter impose a
12 sentence upon you of one year and a day on each count to
13 run concurrently?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: And did you upon the -- and were
16 you found guilty before Judge Brieant of using the mails
17 to defraud and conspiracy to do so?

18 THE DEFENDANT: I pleaded guilty to it. It
19 was the same airline ticket as in the State Court.

20 THE COURT: And were you released from the
21 state custody sometime in 1974, 1975, March 31, 1975,
22 to be exact?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Did you then commence service
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of a sentence imposed by Judge Carter on that day?

THE DEFENDANT: Yes.

THE COURT: And were you released on December 24, 1975, upon parole from that sentence?

THE DEFENDANT: I don't believe that's the date.

THE COURT: What date was it?

THE DEFENDANT: I don't recall but I don't think that's the date.

September 3rd, I believe.

THE COURT: You went to the Federal Community Treatment Center on September 3, 1975.

THE DEFENDANT: Yes, sir.

THE COURT: You stayed there until December 24, 1975. Is that correct?

THE DEFENDANT: Yes.

THE COURT: Then you were released to the community, is that right?

THE DEFENDANT: Yes.

THE COURT: At that time you were under the probation sentence of Judge Briant, were you not?

THE DEFENDANT: Yes.

THE COURT: And did you about a month after your release from parole commit the crimes which you were

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2 found guilty of here in this case?

3 THE DEFENDANT: No.

4 THE COURT: January 28, 1976, February 2, 1976,
5 February 6, 1976?

6 THE DEFENDANT: No. I stand by what I say,
7 what I said in my testimony.

8 THE COURT: I will impose a sentence -- I
9 gather Counts 1, 2 and 3 are ten year sentences maximum?

10 MR. NAFTALIS: That is correct.

11 THE COURT: And Count 4 is a five year
12 sentence?

13 MR. NAFTALIS: That is correct, your Honor.

14 THE COURT: I will impose a sentence of seven
15 years on Counts 1 and 2, to run consecutively; I impose
16 a sentence of five years on Count 4 to run consecutively
17 to the sentence imposed on Counts 1 and 2; I suspend the
18 imposition of sentence on Count 3 and place you on
19 probation for a period of five years to follow the expira-
20 tion of the sentences imposed on Counts 1 and 2.

21 MR. POLLACK: Your Honor, Counts 1, 2 and
22 4 consecutive as to each other?

23 THE COURT: Counts 1, 2 and 4 are concurrent.
24 Count 3 is consecutive.

25 I will repeat the sentence.

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2 I impose a sentence of seven years on Counts
3 1 and 2 to run concurrently. I impose a sentence of Count
4 4 to run concurrent with the sentence imposed on Counts
5 1 and 2. I suspend the imposition of sentence on Count 3
6 and place the defendant on probation for a period of
7 five years to commence upon the expiration of the sentence
8 imposed on Counts 1 and 2.

9 If the defendant is found guilty of violation
10 of probation imposed on Count 3, he will be returned to
11 this Court and I will impose a jail sentence upon that
12 violation.

13 Do you understand that, Mr. Heimerle?

14 MR. POLLACK: Under what provision of the
15 Code is the Court sentencing the defendant?

16 THE COURT: You are familiar with the provisions
17 of the Code that I am sentencing the defendant under.

18 MR. POLLACK: Is it A-1, your Honor?

19 THE COURT: Of course not. It is a straight
20 sentence. No A-1. No A-2. Straight sentence.

21 MR. POLLACK: Would the Court entertain a
22 motion for reduction of bail pending appeal?

23 THE COURT: No.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA,

-v-

76 Cr. 442

JAMES F. HEIMERLE,

Defendant.
-----x

PRELIMINARY STATEMENT

The defendant, James F. Heimerle, was arraigned in May, 1976 in the Southern District Court of New York on charges of violating 18 USC §371. The case was assigned to the Honorable Judge Milton Pollack who shortly after the arraignment set September 13, 1976 as a firm trial date. Shortly before September 13, 1976 the government moved for an adjournment of the trial date which motion was granted by the court. On September 21, 1976 the government filed with the court a Notice that the Government wished to have the defendant treated as a Dangerous Special Offender. The Government's Notice states in its body that it is filed in compliance with §3575(a) Title 18,

United States Code and it seeks imposition of sentence pursuant to §3575(b) of Title 18, United States Code. The Notice goes on to state that it is the Government's belief that the defendant is a Dangerous Special Offender pursuant to the definition set forth in §3575(e)(2) of Title 18, United States Code.

ARGUMENT

POINT I

THE GOVERNMENT'S NOTICE IS DEFECTIVE
IN THAT IT FAILS TO ALLEGE A REQUIRED
ELEMENT AS SET FORTH IN TITLE 18,
UNITED STATES CODE §3575, SUBSECTION (f)

At the outset of this argument it must be noted that the defendant does not concede the constitutionality of the legislation in question. However, because of the form in which the Government has chosen to file its Notice that the defendant is a Dangerous Special Offender, this Court need not decide the complex constitutional issues presented by the statute. Even if the legislation is valid in every respect, the prosecution has failed to follow the requirements of the statute concerning notice with particularity of the charge against the defendant.

"It is clear from the plain, unambiguous language of Section 3575 that before the Court may impose sentence pursuant to Section 3575(b) two separate and distinct tests must be satisfied. First, the Court must find the defendant

to be a 'special offender' within the meaning of Section 3575(e)(1,2,3), and second, the defendant must be found to be 'dangerous' within the definition of Section 3575(f). It is apparent under the definitions of this section that an individual may be found to be a 'special offender' under one of the three sub-parts of section 3575(e) without necessarily being found to be 'dangerous' as defined in Section 3575(f). Further, pursuant to Section 3575(a) a notice filed under this section must (1) include a statement specifying that the defendant is a 'dangerous special offender' who upon conviction is subject to the imposition of sentence under Section 3575(b), and (2) set forth 'with particularity the reasons why the attorney for the United States believes the defendant to be a 'dangerous special offender'". United States v. Kelly, 384 F.Supp. 1394, 1398 (W.D. Missouri, 1974)

A plain reading of the Notice filed by the Government in this case clearly establishes that the Government has charged the defendant in the language of the statute with being a special offender. This is simply not sufficient to satisfy the statutory requirements. As the Court noted in United States v. Duardi, 384 F. Supp. 856, 860 (W.D. Missouri 1973):

"The complicated procedure established by those sections makes clear that even though one may be found to be a 'special offender' within the meaning of §3575(e), he may not properly be sentenced under that section unless he also be found to be 'dangerous' within the meaning of §3575(f). Subsection (f) expressly provides that a defendant may be considered to be 'dangerous' for purposes of sentencing only if it is determined that 'a period of confine-

ment longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant."

Therefore, it is submitted that the Government has the burden of charging and proving two elements before the Court may sentence the defendant as a Dangerous Special Offender. In its charging document the Government has failed to allege one of the essential elements which must be provided before the statute can be invoked and, therefore, even if the Government introduced evidence sufficient to prove the defendant a special offender as charged, they still will not have established that the defendant is a Dangerous Special Offender. The Government having failed to allege the requisite elements in its charging document, the Court must dismiss, without a hearing, the Notice against the defendant charging him as being a Dangerous Special Offender.

POINT II

BY NOT STATING BEFORE TRIAL AND WITH PARTICULARITY THE REASONS FOR BELIEVING THE DEFENDANT IS A DANGEROUS SPECIAL OFFENDER THE NOTICE FILED BY THE PROSECUTION DEPRIVED THE DEFENDANT OF ESSENTIAL STATUTORY RIGHTS

Section 3575(a)(2) provides that the Prosecutor's obligation in filing such a notice is in "setting out with

particularity the reasons why such attorney believes the defendant to be a dangerous special offender." In this Notice the Government charges the defendant with being a Dangerous Special Offender by restating the statutory language in §3575(e) (2) defining a special offender. The Notice continues to charge the defendant with prior crimes of a similar nature and with committing the charged crime while on parole from a prior offense.

"A notice under Section 3575(a) must set forth with particularity why the United States believes the defendant is a 'special offender under Section 3575(e) and why the United States believes he is dangerous' as defined by Section 3575(f)." Kelly, supra, 1399.

The Notice filed in this case fails to allege, charge or set out any underlying facts upon which the Court can find the defendant to be a Dangerous Special Offender. The Government's Notice makes no mention of a second necessary element to be proven specifically that the mandates of §3575(f) have been violated. The Notice makes no statement about the reasons for which defendant is believed to be dangerous.

Reasonably construed, the notice provisions of §3575(a) require more than specifying the section of ^N§3575 that is charged. The notice should state the reasons that defendants are believed

to be special offenders with particularity as to the evidence relied upon. Further it should with similar particularity state the reasons defendants are believed to be "dangerous" as defined in §3575(f).

The Government nowhere in its Notice sets forth any information relative to the defendant's source of income or what percentage of that income his alleged criminal activities resulted in. Counsel lacks any notice as to the Government's allegation on the issue of income as well as to what, if any skill or expertise, the Government alleges the defendant exhibits in his criminal conduct. The prosecution's notice leaves the defense in a dilemma. We are faced with a new proceeding but we are not given notice of any new information forming the basis for the special offender charge.

Why does the prosecution believe the defendant is dangerous? The Notice contains no statement or any reason for this conclusion. There is no particularization as to what leads the prosecution to believe that the defendant must be incarcerated for a longer period of time than provided for by the statutes contained in the Indictment^{*} upon which he was convicted in order to protect the public.

* 35 YEARS

"Accordingly it does appear that the Notice filed in this case fails to satisfy the requirements of Section 3575(a) requiring the 'setting out with particularity the reasons'"
See Kelly supra, page 1399.

POINT III

§§3575-3578 UNCONSTITUTIONALLY AUTHORIZE THE USE OF UNRELIABLE AND ILLEGALLY OBTAINED EVIDENCE IN VIOLATION OF DUE PROCESS OF LAW

Where one conviction forms the basis for another proceeding in which a new finding of fact triggers increased punishment-- that punishment is criminal punishment. The proceeding is then subject to the requirements of due process. Specht v. Patterson 386 U.S. 605(1967). In Specht the Court dealt with Colorado's Sex Offenders Act which

"may be brought into play if the trial court 'is of the opinion that any . . . person [convicted of specified sex offenses] if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill.'" 386 U.S. at 608.

The current proceeding is not unlike Specht. The proceeding is criminal in nature, and is triggered by a criminal conviction. These factors were sufficient for the Court to distinguish Minnesota v. Probate Court, 309 U.S. 270 (1940) in footnote 3 of Specht. Further, the Specht Court declined to apply Williams v. New York, 337 U.S. 241(1949) to the Specht proceeding.

In Williams, the Court dealt with a radically different situation than this case presents. Williams dealt with traditional sentencing. The conviction itself authorized either a life sentence or capital punishment. A probation report prepared by an arm of the judiciary was considered in choosing between a life sentence and death. The defendant was aware of the information relied upon, but made no objection. Due process was held not to be violated in such a proceeding where hearsay in a probation report was used to help the judge exercise his discretion in choosing a sentence within limits fixed by the law of the offense so convicted. There was no separate finding of fact akin to guilt in Williams which subjected that defendant to additional penal sanctions.

In this case the finding that defendant is a dangerous special offender would be akin to a finding of guilt. Section 3577 places no restrictions on the type of information to be used in finding defendant to be a dangerous special offender. Specht said Williams was not applicable to a proceeding similar in all material respects to this proceeding under §§3575-3578. Due process in Specht excluded hearsay in the form of a medical expert's report. Consideration of hearsay evidence in this case would deny defendants the right to confront and cross-

examine the actual witnesses against them in violation of both due process and their Sixth Amendment right to confrontation and cross-examination. Pointer v. Texas, 380 U.S. 400 (1965).

§§3575-3578 open the evidentiary door to even more than hearsay. Indeed, separate legal problems arise from the total lack of restrictions on admissible information.

It is clear that a sentence must not be founded, even in part, upon "mis-information of constitutional magnitude" United States v. Tucker, 404 U.S. 443, 447(1972)(reliance on prior convictions that were obtained without counsel). Nor can a sentence be based on illegally obtained confessions. Arm-priester v. United States, 256 F.2d 294 (4th Cir. 1958); United States v. Rundle, 419 F.2d 282 (3rd Cir. 1969). Due process has also been held to prohibit consideration of a defendant's organized crime connections in sentencing. United States v. Rao, 296 F.Supp. 1145 (S.D.N.Y. 1969). Further, evidence which has been illegally seized is available for §§3575-3578 sentencing. Consideration of such information is also a violation of due process. Verdugo v. United States, 402 F.2d 599,608-613 (9th Cir. 1968) cert. denied, sub nom., Turner v. United States, 397 U.S. 925 (1970). United States v. Schipani, 435 F.2d 26, cert. denied, 401 U.S. 983 (1971) allowed the use of illegal

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wiretap information in sentencing since illegal police behavior would be deterred by exclusion at trial. This rationale presumes the purpose of the illegal behavior is to obtain convictions; it falters if the police seek the information for sentencing. The extra twenty-five years provided by a conviction under this statute is a greater incentive to practice illegal behavior than a five year felony term.

The crucial question this Court must decide then is how far the rationale of Williams can be extended. If Specht was a "radically different situation", 386 U.S. at 608, then so is a proceeding under §3575(e)(2). To extend Williams to cover this proceeding would, in effect, overrule Specht, by 18 years the more recent case.

Defendant does not urge this Court to exclude information, such as the presentencing report, when it determines the length of sentences to be imposed. But certainly defendant should have the opportunity to rebut any information considered in choosing the sentence from the statutory range. What the defense in this case seeks is the elimination of hearsay and illegally obtained evidence from the fact finding which determines the range of possible sentences -- here the twenty-five year sentence.

POINT IV

DUE PROCESS REQUIRES THE FINDING OF FACT THAT HERE SUBJECTS DEFENDANTS TO ADDITIONAL PENAL SANCTIONS TO BE PROVED BEYOND A REASONABLE DOUBT

The prosecution must show that this statute applies to this defendant, but §3575 (b)-allows satisfaction of that burden by a mere preponderance of the information. This standard of proof has been applied to most civil proceedings where the stakes are frequently economic and where "we view it as no more serious in general for there to be an enormous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor." In re Winship, 397 U.S. 358, 371 (1970) (Harlan, J, concurring). The interests at stake here are not so equally balanced. Here the prosecution is pitted against an individual who has at stake

an interest of transcending value--as a criminal defendant his liberty--this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.

Speiser v. Randall, 357 U.S. 513, 525-526 (1958).

If a finding against defendant as being dangerous special offender is seen akin to a finding of guilt, then In re Winship

requires a standard of proof beyond a reasonable doubt on each essential fact." Even if this proceeding does not technically determine "guilt", the defendant has at stake an interest of transcending value -- his liberty -- which should require application of the higher standard of proof.

A fact finding which jeopardizes the liberty of an individual even in a civil commitment proceeding for the "mentally ill" is required to meet a higher standard than is required by this statute. In re Ballay, 482 F. 2d 648 (D.C. Cir. 1973); and Douglas, J. dissenting to dismissal of cert. as improvidently granted in Murel v. Baltimore, 407 U.S. 355 (1972). This Court should keep in mind that the type of evidence admitted is a separate issue from how convincing that evidence must be to the fact finder.

CONCLUSION

For the reasons stated herein, the Court should dismiss the Government's Notice asking that the defendant be adjudged a Dangerous Special Offender.

Respectfully submitted,

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2 Copies Received
Date August 15, 1977
Firm Hon. Robert B. Fiske, Jr.
By _____

